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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

THE CITY OF MCKEESPORT and
WILLIAM WEISSERT,
Petitioners,

v.

REBECCA L. CUNNINGHAM, an individual,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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COUNTERSTATEMENT OF THE CASE

The Respondent, Rebecca L. Cunningham (CUNNINGHAM), commenced the within civil rights action pursuant to 42 U.S.C. Section 1983 against the Petitioners, the City of McKeesport (McKEESPORT) and its building inspector, William Weissert, in August of 1981. The relevant facts underlying the dispute between the parties may be summarized as follows:

In November of 1980, CUNNINGHAM purchased a house and garage in the City of McKeesport from the U.S. Department of Housing and Urban Development. Following completion of minor repairs, CUNNINGHAM applied for a subsidized loan through the Improvement Program of Allegheny County (IMPAC) in order to renovate the property. In February of 1981, IMPAC approved CUNNINGHAM's application for a $15,000.00 loan, to be repaid in 15 years without interest. In addition, CUNNINGHAM entered into a contract for the renovation of her property for $15,000.00. However, before the work could be started, and without prior notice to CUNNINGHAM, McKEESPORT totally demolished CUNNINGHAM's house and garage.

To seek redress, CUNNINGHAM contacted the law firm of NERNBERG & LAFFEY, who agreed to accept her case on a contingency fee basis. NERNBERG & LAFFEY thereafter filed a Complaint against McKEESPORT, who was responsible for the demolition, its building inspector, who authorized the demolition, the members of McKEESPORT City Council, who were required to approve the actions of the building inspector, and the demolition contractor. The Complaint alleged that Defendants had violated CUNNINGHAM's rights under 42 U.S.C. Section 1983, by depriving her of property without due process of law, and requested damages for the following:

A. Loss of her house and garage which would have had a post-renovation market value in excess of $40,000.00;

B. Loss of use of the house as a residence;

C. Loss of the opportunity to receive a $15,000.00 interest free loan; and

D. Damages for emotional distress and punitive damages.

The law firm of TRUSHEL, WOOD & ISRAEL entered an appearance on behalf of Petitioners and filed an Answer denying liability and asserting that the District Court lacked subject matter jurisdiction. Petitioners later filed an Amended Answer asserting the defense of immunity. The parties thereafter engaged in extensive discovery, and in June of 1982, met for the preparation and filing of a Joint Pretrial Stipulation. In the Pretrial, Defendants again denied liability and contested the jurisdiction of the Court. The parties continued to engage in discovery, and in September of 1982, met for a Pretrial Conference before the District Court. At the Pretrial, the District Judge ordered briefs to be filed on a number of issues and required that the parties submit Proposed Points for Charge with legal citations, substantially in advance of trial. Trial was scheduled for April of 1983, and from September through April, the parties continued with discovery. In addition, since Petitioners continued to contest liability and jurisdiction, and at no time made a concrete offer to settle the case, Respondent engaged in extensive preparation for trial.

Trial began in April of 1983 and continued for four days. The evidence which unfolded at trial indicated both a widespread abuse of the procedures employed by McKEESPORT for the demolition of property as well as a total disregard of CUNNINGHAM's due process rights. Thus, although McKEESPORT's ordinance which permitted it to demolish "dangerous properties"

required the building inspector to notify the property owner of the city's intention to demolish, the building inspector admitted that he had not personally notified an owner since 1976. Although the ordinance required the building inspector to examine public records found in the Registrar of Deeds to determine the record owners of the property, the building inspector testified that he did not have time for such duties, but merely assumed that someone else in his office had verified ownership. However, the building inspector admitted that he made no efforts to review or verify their findings, if in fact there were any. In fact, none of the witnesses who testified on behalf of McKEESPORT were able to identify what efforts were made to notify CUNNINGHAM of the proposed demolition. In addition, although the ordinance in question permitted demolition of "dangerous" buildings only, McKEESPORT was unable to establish that CUNNINGHAM's house was in fact dangerous. The building inspector testified that he slated the house for demolition due to a fire which had occurred years earlier. Although the building inspector stated that no fire damage was visible from the outside of the building, he admitted that he had never seen the inside. Moreover, although the so-called "fact-finding hearing" conducted with respect to the property concluded that the building inspector should examine the inside of the house prior to authorizing demolition, he admitted that he neglected to do the same since "he did not have time".

On the basis of the above evidence, counsel for Respondent requested an instruction on punitive damages which was refused by the District Court. The District Court then submitted the case to the jury on special interrogatories which permitted them to award damages for the pre-demolition value of the house, the loss of the $15,000.00 no-interest loan and emotional distress. The jury thereafter returned a verdict in favor of CUNNINGHAM in the amount of $35,000.00, allocating $20,000.00 for CUNNINGHAM's loss of the house and

$15,000.00 for loss of the no-interest loan. In addition, by virtue of Answers to Special Interrogatories, the jury specifically found that Respondents had violated CUNNINGHAM's civil and constitutional rights. Both parties filed post-trial motions, and as a result of the same, the District Court entered an Order reducing the jury's verdict to $17,000.00. The aforesaid reduction was based upon the District Court's opinion that damages for loss of the loan had been improperly submitted to the jury and that the testimony concerning the pre-demolition market value of the house could not support a verdict in excess of $17,000.00. CUNNINGHAM thereafter met with the members of NERNBERG & LAFFEY who advised her to appeal as they believed the District Court had erred in excluding certain elements of damages from the jury's consideration as well as in reducing the verdict. However, CUNNINGHAM chose not to appeal since she was in need of money and desired the "quickest possible resolution of the case."

NERNBERG & LAFFEY thereafter filed a Motion for Counsel Fees pursuant to 42 U.S.C. Section 1988, as well as an extensive Affidavit, based upon actual time records, detailing the items of work performed and the time spent for each. Petitioners did not file an Affidavit in opposition to the Motion for Counsel Fees, nor did they seek an opportunity to examine the members of NERNBERG & LAFFEY on the accuracy of the Affidavit. Instead, Petitioners merely filed a brief asserting that CUNNINGHAM was entitled to no fees since she had entered into a contingent fee arrangement, or in the alternative, since her case did not advance the civil rights of the public at large. Although the Affidavit in Support of the Motion for Counsel Fees was uncontradicted, and no hearing was requested with respect to the same, the District Court reduced the hours for which compensation was awarded by approximately one-third (⅓), cut the hourly rate requested in half, from $100.00 per hour to $50.00 per hour, and finally reduced the resulting

lodestar amount by fifty (50%) percent since "the decision affected only an individual plaintiff."

CUNNINGHAM appealed the District Court's Order regarding Counsel Fees to the United States Court of Appeals for the Third Circuit. Following the submission of briefs and oral argument before a panel of the Third Circuit, the panel issued an Opinion and Order reversing the judgment of the District Court and remanding the case for entry of judgment for the lodestar amount requested. Petitioners filed a Petition for Rehearing which was denied by the Court En Banc. The within Petition for Writ of Certiorari before this Honorable Court foliowed.

SUMMARY OF ARGUMENT

The law is clear that the number of hours reasonably expended upon a case as well as the reasonableness of the hourly rate requested in a Petition for Attorneys' Fees are questions of fact. Since Petitioners failed to submit any evidence to the District Court to challenge the accuracy and reasonableness of the hours charged and hourly rate requested by Respondent, no factual issues were raised and thus Petitioners have waived these arguments.

The District Court made a downward adjustment to the lodestar of fifty (50%) percent since it found that the litigation benefitted only a single plaintiff. Since such finding was not supported by the record and would not justify a downward adjustment to the lodestar even if true, the Third Circuit properly reversed the District Court and remanded the case for entry of judgment for the lodestar amount.

ARGUMENT

I. PETITIONERS' FAILURE TO CHALLENGE THE REASONABLENESS OF THE HOURS EXPENDED AND HOURLY RATE REQUESTED IN THE DISTRICT COURT CONSTITUTED A WAIVER OF THESE ISSUES.

As previously set forth, Petitioners failed to file an Affidavit in Opposition to Respondent's Motion for Counsel Fees, nor did they request a hearing to challenge the accuracy of Respondent's Affidavit setting forth the hours expended, the necessity for their expenditure and the hourly rate requested. As a result, the Third Circuit held that the District Court erred in reducing these items since Petitioners failed to challenge them:

> . . . when an opposing party has been afforded the opportunity to raise a material fact issue as to the accuracy of representations as to hours spent, or the necessity for their expenditure, and declines to do so, no reason occurs to us for permitting the trial court to disregard uncontested affidavits filed by a fee applicant (Appendix, 8a)
>
> . . . we have consistently held that the lodestar calculation must be based on historical time charges for individual attorneys. What those time charges are is a factual question. Since Cooney's Affidavit is uncontradicted, there is no material issue of fact (Appendix, 10a)

Since the Third Circuit's holding is amply supported by precedent from both this Court as well as other decisions in the Third Circuit, it must be upheld.

A case directly on point is this Court's recent decision in *Blum v. Stenson*, ____U.S. ____, 104 S. Ct. 1541, ____L. Ed.2d ____(1984). In *Blum*, the Petitioner was contesting a fee award made pursuant to 42 U.S.C. Section 1988 to a legal aid society. Although the main thrust

of Petitioner's argument was that fee awards to legal aid societies should be based upon cost rather than on prevailing market rates, Petitioner also argued that the number of hours requested by the Respondent's counsel were unreasonable. However, since the Petitioner failed to submit evidence in the District Court to support his claim that the hours charged were unreasonable, this Honorable Court refused to consider the issue. As set forth in the Opinion of Justice Powell:

> We decline to consider the petitioner's further argument that the hours charged by respondents' counsel were unreasonable. As noted above, petitioner failed to submit to the District Court any evidence challenging the accuracy and reasonableness of the hours charged, see *Hensley*, supra. ____U.S., at ____, 103 S.Ct. at 1039, or the facts asserted in the affidavits submitted by respondents' counsel. It therefore waived its right to an evidentiary hearing in the District Court. See *City of Detroit v. Grinnell Corporation*, 495 F.2d 448, 472-473 (CA2 1974) (where facts are disputed, an evidentiary hearing is required before a district court determines a proper attorney's fee award). In view of the trial strategy it choose, petitioner waived its right to challenge in this Court the District Court's determination that the number of hours billed were reasonable for cases of similar complexity.

104 S.Ct. at 1554.

In addition, the Third Circuit's holding in the present case is amply supported by previous decisions in both the Third Circuit and other circuits. See, for example, *Danny Kresky Enterprises Corporation v. Magid*, 716 F.2d 215, 219 (3rd Cir., 1983). See also, *Wheatly v. Ford*, 679 F.2d 1037, 1040 (2nd Cir. 1982): "Because defendants do not contest the number of hours or the hourly rates claimed by the plaintiff's attorney, the appropriateness of the lodestar figure is not at issue."

Throughout their Brief, Petitioners urgently insist that the fee award in the present case is not compensatory but punitive, and that a gross injustice will occur if the holding of the Third Circuit is permitted to stand. Thus, Petitioners now assert that CUNNINGHAM's prosecution of the case was unreasonable since she demanded damages that were greatly in excess of the $17,000.00 ultimately awarded. However, the jury awarded CUNNINGHAM $35,000.00, and was not even permitted to consider a number of damage items which were supported by the evidence, including punitive damages. Althugh the District Court ultimately reduced the award to $17,000.00, counsel for CUNNINGHAM at all times advised her that the reduction was improper and should have been appealed. In fact, in its Opinion reversing the District Court's fee award, the Third Circuit agreed that "the verdict would support a judgment in Cunningham's favor for $35,000.00" (Appendix, 4a). In addition, Petitioners assert that CUNNINGHAM unreasonably refused their settlement offers causing fees to be inflated. However, this statement is patently untrue in that Petitioners did not even make a concrete settlement offer until the day before trial, when most of the work on behalf of CUNNINGHAM had already been done. Moreover, this argument should not even be considered since none of the settlement discussions have ever been made a part of the record in this case. Finally, as set forth in the above authorities, any perceived impropriety in the award was caused by Petitioners' own failure to properly challenge the fees requested in the District Court. Thus, the Petition for Writ of Certiorari must be denied.

II. THE THIRD CIRCUIT'S OPINION IS IN FULL ACCORDANCE WITH THE STANDARDS FOR REVIEW ESTABLISHED FOR ATTORNEYS' FEES CASES.

Petitioners vigorously contend that since the amount of a fee award is within the discretion of the District Court, the Third Circuit "substituted its judgment" for that of the District Court in reversing the deductions made from Respondent's fee request. However, although an attorneys' fee award is in fact within the discretion of the District Court, the law is clear that the District Court abuses such discretion when it relies upon improper factors in making its fee determination. See, *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 1941, 76 L.Ed 2d 40 (1983); *Ursic v. Bethlehem Mines*, 719 F.2d 670 (3rd Cir., 1983).

In the present case, the District Court made a fifty (50%) percent downward adjustment to the lodestar amount solely because "The decision affected only an individual plaintiff who was subject to an isolated act of deprivation for which she was adequately compensated. There was no indication of bad faith in the defense of the action" (Appendix, 23a). Initially, it should be noted that such finding was not supported by the record in the case, but on the contrary, the evidence indicated that the procedures employed by the Petitioners for the demolition of property had been constitutionally defective since at least 1976. Although Respondent did not attempt to prove that Petitioners violated the due process rights of other specific property owners, it is certain that Petitioners will be more careful to respect such rights when demolishing properties in the future as the result of this case. Moreover, the factors relied upon by the District Court to reduce the lodestar are clearly improper factors in the determination of statutory attorneys' fees pursuant to 42 U.S.C. Section 1988. As stated by this Honorable Court in *Blum v. Stenson*, supra.:

> Nor do we believe that the number of persons benefited is a consideration of significance in calculating fees under Section 1988. Unlike the calculation of attorney's fees under the "common fund doctrine," where a reasonable fee is based on a percentage of the fund bestowed on the class, a reasonable fee under Section 1988 reflects the amount of attorney time reasonably expended on the litigation. Presumably counsel will spend as much time and will be as diligent in litigating a case that benefits a small class of people, or, indeed, in protecting the civil rights of a single individual.

104 S.Ct. at 1549-1550.

In the instant case, the Third Circuit very assiduously considered each of the reasons assigned by the District Court to justify its decision. It carefully pointed out in each instance how and why the District Court applied improper factors in reaching its award. It also found that there was no evidence in the record to support the District Court's discretionary adjustment to either the hours and hourly rate requested or the lodestar amount. As such, the Third Circuit found that the subjective adjustment of the award was an arbitrary abuse of discretion by the District Court. Its decision therefore was clearly not a substitution of its judgment for that of the District Court, but was an application of the proper standard of review of an award of attorneys' fees.

CONCLUSION

In conclusion, it is respectfully requested that this Honorable Court dismiss the Petition for Writ of Certiorari and remand the case to the District Court for the entry of judgment.

Respectfully submitted,

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